

## APPENDIX B

## THE COMMANDER'S ROLE IN THE MILITARY JUSTICE SYSTEM

## Section I. ACTIVE COMPONENT

**B-1. Commander**

Commanders play a major role in the military justice system by setting standards and enforcing discipline within their units. Good leadership techniques, reinforced by a strong NCO corps, provide most of the means to enforce discipline. However, sometimes it is necessary to use punitive measures such as trial by court-martial or punishment under Article 15, Uniform Code of Military Justice (UCMJ). This appendix provides background on the commander's role in the military justice system.

*a. Disciplinary Problems.* Commanders have many methods available to them to deal with disciplinary problems. These include administrative actions ranging from informal counseling, extra training, withdrawal or limitation of privileges, and administrative discharges, to punitive options such as punishment under Article 15, UCMJ, and trial by court-martial.

*b. Prosecutorial Discretion.* In the Army, prosecutorial discretion lies with the commander. The commander decides whether a case will be resolved administratively or referred to trial, and what the charges will be. The Manual for Courts-Martial (MCM) gives little guidance in exercising this discretion, except mandating that cases be resolved at the lowest possible level consistent with the seriousness of the offense. Although advice should be sought from the Staff Judge Advocate (SJA), the commander must ultimately make the decision whether prosecution is warranted. In the case of any minor incident, the commander exercising prosecutorial discretion should first decide that none of the varied administrative measures is sufficient before resorting to punitive options.

(1) The decision to refer offenses to trial by court-martial is difficult and can be made for the wrong reasons. When an apparently serious offense occurs, there is great pressure on a commander to do something. Congressional inquiries and expressions of interest from superior commanders tempt some to refer cases to trial to settle the matter. A case should never be referred to trial unless the convening authority is personally satisfied, by legal and

competent evidence, that there is probable cause to believe that the accused is guilty and should be punished. On the other hand, a commander may find occasions when the accused's conduct satisfies the legal elements of a crime, but for reasons of compassion, the interests of justice, or other considerations, the accused should not be punished under Article 15 or by court-martial.

(2) The commander must exercise reasoned judgment when confronted with a military justice problem. Always keep in mind the policy of handling problems at the lowest possible level commensurate with the seriousness of the offense. Also, keep in mind that military justice is only one way of maintaining discipline—it is a tool of leadership, but not the only tool. While discretion in many of these areas rests with the commander, legal advice can and should be sought from the trial counsel or SJA.

**B-2. Command Influence**

*a.* Article 37 of the UCMJ makes it unlawful for a convening authority to attempt to influence the members of a court-martial as to the outcome of the trial. This is the area where a commander must exercise a great deal of care. There must be no appearance of unlawful command influence in the operation of the military justice system. It is important personally for the commander to learn to control his impulses. It is also important for the discipline and efficiency of the command that the commander be considered fair and impartial. Lastly, there is systemic importance—the impact on civilian impressions about military justice.

*b.* Unlawful command influence is unnecessary. The system provides commanders with all the tools necessary to effectively implement and control a disciplinary system within their command. Unlawful command control is easily avoided. There are only a few simple rules which must be followed. Command control problems are often problems in communication. The good intentions of a commander lead to command control problems when subordinates misinterpret or misunderstand the commander's message.

c. Lawful controls and prohibitions.

(1) In the pretrial phase, the commander has the power to gather facts, using either a commander's inquiry, law enforcement agencies, or an Article 32 investigation. He has the power to affect disposition of an incident, using the non-punitive options mentioned above, an Article 15, or by preferral of charges, and, if authorized, referral to court-martial. The commander may also overrule a subordinate's disposition, pull the action up to his level, and take whatever action he sees fit. During the trial phase, the General Court-Martial Convening Authority (GCMCA) may be able to grant immunity to witnesses. During the posttrial phase, the commander will, if he referred the case to trial, approve or disapprove the findings and sentence of the court. He may also request reconsideration of adverse rulings, or order a rehearing in cases where a legal error was made during the trial that substantially affected the findings or sentence.

(2) Prohibitions pertaining to command influence include—

- Ordering a subordinate commander to make a specific disposition.
- Referring a case to trial and personally signing the charge sheet, or ordering someone else to sign the charge sheet if you are the commander with authority to refer a case to trial.

#### NOTE

If the commander with authority to refer signs the charge sheet, he has become an accuser and will be disqualified from further action.

- Interfering with subordinates in exercising their own independent judgment (avoiding policy letters).

The commander cannot attempt to influence actions of a court-martial in arriving at findings or sentence. He cannot intimidate or discourage a witness from testifying for an accused. The commander cannot censure, reprimand, admonish, or give unfavorable efficiency ratings to personnel for participating as court members.

(3) There are several common situations which may cause problems in the area of command influence.

(a) Superior commanders sometimes establish policies concerning unit discipline. For example, a battalion directive may express concern over the high rate of motor vehicle violations. These directives do not violate Article 37 as long as they do not become too specific and as long as they do not mandate specific actions which cause the subordinate to surrender his discretion under the UCMJ. A directive which expresses concern over a high rate of motor vehicle accidents would be permissible, while a directive requiring all motor vehicle accident cases to be tried by general court-martial would be unlawful. Commanders should always staff any proposed directive through the supporting judge advocate to avoid even inadvertent unlawful command influence.

(b) Another problem in this area concerns instructions. Certain orientation courses on military justice may violate the prohibition against unlawful command influence. For example, instructions to potential court members immediately before trial of an absent without leave (AWOL) case as to the need for severe punishment in that type of case is unlawful.

(c) Finally, a commander must not show his personal interest in the outcome of a particular case or otherwise interfere in anyway with the conduct of the trial. He may not censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceedings.

(4) There is an absolute prohibition against evaluating the performance of an individual as a member of a court-martial in preparing his efficiency report, or in determining his fitness for promotion, transfer, or retention.

### B-3. Options Available to the Commander

At every level of command there are a number of options available to deal with a disciplinary problem. This section concerns the various

measures which can be taken when dealing with crimes committed by a soldier.

*a. Adverse Administrative Actions and Eliminations.* A commander may take or initiate administrative action whether or not charges have been or will be preferred, or have been dismissed short of trial. Administrative alternatives include—

(1) *Counseling* (AR 600-20, paragraph 5-7). This is a basic leadership tool and is used to assist soldiers in professional growth. It is not always adverse in nature. Soldiers will be counseled by a responsible person about deficiencies at least once before initiating separation action under provisions of AR 635-200. Each counseling session will be recorded in writing, normally on a DA Form 4856-R. Counseling statements will be filed in unit personnel files (not in Military Personnel Records Jacket [MPRJ] or official military personnel file [OMPF]).

(2) *Bar to reenlistment* (AR 601-260). Only personnel of high moral character, personal competence, and demonstrated adaptability to the requirement of the professional soldier's moral code will be reenlisted in the Regular Army. Persons who do not measure up to such standards may be barred from reenlistment. This is done on the basis that a soldier is either untrainable, unsuitable, or a single soldier/in-service couple (with dependent family members) who is unable to provide an approved family member care plan. Any commander in the soldier's chain of command may initiate a bar if the soldier's actions violate the standards set forth in AR 601-280. Normally, soldiers in a unit for less than 90 days or in their last 30 days of service will not be barred. The soldier is allowed 7 days to comment without right to counsel. Rebuttal matters are attached to the bar certificate. A bar to reenlistment must be reviewed by the unit commander at least once every 6 months after approval and 30 days before the soldier's permanent change of station or expiration term of service.

(3) *Administrative written reprimand* (AR 600-37). This is another leadership tool, the purpose of which is to officially document misconduct or poor performance in official files. For an enlisted soldier, the immediate commander or any higher commander in the chain of command, a supervisor, school commandant, general officer, or

GCMCA can initiate. For officers, the immediate commander or higher level commander in the chain, a general officer, rater, intermediate rater, or senior rater can initiate. The soldier is entitled to notice of the proposed action and the opportunity to rebut the allegations. Memoranda of reprimand may be filed either in the local file or MPRJ, or in the DA file, the OMPF. Filing of memoranda in the MPRJ for both enlisted soldiers and officers may be directed by an immediate commander or a higher level commander, general officer, or GCMCA (for officers, also includes rater, intermediate rater, and senior rater). Reprimands are filed for 3 years or until reassignment to another general court-martial (GCM) jurisdiction. Filing in the OMPF must be directed by a general officer or a GCMCA.

(4) *Enlisted administrative separations.* The most common types are overweight (AR 635-200, Chapter 5); alcohol/drug rehabilitation failure (AR 635-200, Chapter 9); unsatisfactory performance (AR 635-200, Chapter 13); misconduct (AR 635-200, Chapter 14); and homosexuality (AR 635-200, Chapter 15). A soldier may receive either an honorable, general, or other than honorable (OTH) conditions discharge. A soldier always receives notice of action and has a chance to rebut. A soldier is entitled to a hearing before a board if he has more than 6 years of service or an OTH discharge is being sought.

*b. Nonjudicial Punishment.* Punishment may be imposed under Article 15, UCMJ, for minor offenses. Article 15 punishment provides the commander with an efficient and prompt means of maintaining good order and discipline, promoting positive behavioral changes in soldiers, and avoiding the stigma of a court-martial conviction. An Article 15 is appropriate for minor violations of the UCMJ, or when nonpunitive administrative measures fail or are inappropriate. There are summarized and formal Article 15 proceedings; the difference is the amount of punishment which can be administered and that only enlisted soldiers may receive a summarized Article 15. Only commanding officers may impose an Article 15. The commander must be a commissioned or warrant officer; noncommissioned officers have no Article 15 authority. An Article 15 may only be imposed on a soldier assigned or attached to the commander's unit. Acceptance of an Article 15 is **not** an admission of guilt. The soldier is merely agreeing to

let the commander be the person who will decide guilt or innocence and impose punishment. A soldier always has the right to demand trial by court-martial.

*c. Preferring Court-Martial Charges.* Any person subject to the UCMJ may prefer charges. However, they are ordinarily preferred by the accused's immediate commander. A person cannot be ordered to prefer charges to which he is unable to truthfully make the required oath on his own responsibility. If a superior authority directs that charges be preferred, the superior authority becomes the accuser, and, as such, he is barred from convening a court-martial to try the charges. When a superior authority has only an official interest in a case, he ordinarily will transmit the available information about the case to an officer of his command for preliminary inquiry and report, including, if appropriate in the interest of justice and discipline, the preferring of any charges which appear to be sustained by the available evidence.

*d. Types of Courts-Martial.*

(1) *Summary Court-Martial.* The Summary Court-Martial (SCM) is designed to promptly adjudicate minor offenses. The SCM can try enlisted personnel only. The maximum punishment, which depends on the accused's rank, is limited to confinement for one month, forfeiture of two-thirds pay for one month, and reduction in

grade (see Rule for Courts-Martial 1301 (d), Manual for Courts-Martial, for permissible punishments). An accused may not be tried by a SCM over his or her objection. If the accused objects, the commander may then consider trial by a higher court-martial. The accused has no right to military counsel at the SCM, but has the right to consult with a military defense counsel before trial and may retain, at no expense to the government, counsel before, during, or after a SCM.

(2) *Special Court-Martial.* The Special Court-Martial (SPCM) can impose a maximum punishment of confinement for 6 months, forfeiture of two-thirds pay per month for 6 months, and reduction to the lowest enlisted grade. An SPCM may be authorized by the convening authority to adjudge a bad-conduct discharge (BCD). Such a court is known as a BCD SPCM. It differs from an ordinary SPCM in that a verbatim record of trial is required and the accused may have a right to an automatic appeal to the Army Court of Military Review.

(3) *General Court-Martial.* The General Court-Martial (GCM) tries the most serious offenses. A formal investigation must be conducted before charges may be referred to a GCM (Article 32, Uniform Code of Military Justice). The GCM may adjudge the most severe sentences authorized by law, including a dishonorable discharge, and when so empowered, death.

## Section II. RESERVE COMPONENT JURISDICTION

### B-4. Authority

Commanders will occasionally have Reserve Component (RC) soldiers assigned or attached to their unit. The Military Justice Amendments Act of 1986 changed the UCMJ and enlarged the scope of jurisdiction over RC soldiers for criminal acts. The Act extends court-martial jurisdiction over reservists while on all types of training without any threshold requirements. (National Guard Personnel must be in Federal, or Title 10, status before the UCMJ applies to them.) It extends court-martial jurisdiction over an RC soldier who violates the UCMJ by decreeing that jurisdiction does not

terminate by virtue of release from active duty (AD) or inactive duty training (IDT). Further, it authorizes, under certain conditions, the involuntary order to AD of an RC soldier for the purpose of an Article 32 investigation, Article 15, or court-martial. The authority to order a member to AD is prescribed in AR 27-10, Chapter 21. The Act also significantly increases the powers and responsibilities of RC commanders and judge advocates.

*a.* As was stated above, US Army Reserve (USAR) soldiers will be subject to the UCMJ whenever they are in a Title 10, United States Code (USC) duty status. Examples of such duty status

are AD; active duty for training (ADT); active guard reserve (AGR) duty; and IDT. The IDT normally consists of weekend drills by units, but may also include any training authorized by appropriate authorities. Contact the servicing SJA if there is a question with regard to continuing jurisdiction.

*b.* Costs associated with disciplining RC soldiers will be paid out of RC funds.

#### **B-5. Involuntary Active Duty and Pretrial Confinement for Reserve Component Soldiers**

*a.* Reserve Component soldiers who are not serving on AD, and who are the subject of proceedings under Article 15 or court martial for offenses allegedly committed while in a Title 10 duty status, may be ordered to AD involuntarily by an Active Component (AC) GCMCA for purpose of—

- Investigation pursuant to Article 32, UCMJ.
- Trial by court-martial.
- Article 15, UCMJ proceedings.

*b.* Involuntary AD is authorized for any of the purposes set out in a above, but is not authorized for the sole purpose of placing an RC soldier in pretrial confinement. After involuntary activation, an RC soldier may be confined or deprived of liberty only upon the approval of the Secretary of the Army or his designee. Requests to place an RC soldier on involuntary AD will be forwarded through command channels to the appropriate major US Army Reserve Command (MUSARC) commander. Requests should include a copy of the charge sheet and a summary of the evidence supporting the charges. Prior to preferral of charges in such cases, commanders will consult with supporting RC and AC SJA personnel.

*c.* The RC soldier must be on AD prior to arraignment at a general or special court-martial, or prior to being placed in pretrial confinement.

#### **B-6. Extending Reserve Component Soldiers on Active Duty**

The requirements for AC GCMCA activation and/or Secretarial approval do not apply to RC soldiers on

AD. Reserve Component soldiers serving on AD, ADT, or AT in a Title 10 duty status may be extended on AD involuntarily, so long as action with a view toward prosecution is taken before the expiration of the AD, ADT, or AT period.

#### **B-7. Preservation of Jurisdiction and Punishment**

*a.* Reserve Component soldiers remain subject to UCMJ jurisdiction for offenses committed while serving in a Title 10 duty status not withstanding termination of a period of such duty, provided they have not been discharged from all further military service.

*b.* All lawful punishments remaining unserved when RC soldiers are released from AD, ADT, AT, or IDT, including any uncollected forfeitures of pay, are carried over to subsequent periods of AD, ADT, AT or IDT. However, an RC soldier may not be held beyond the end of a normal period of IDT for trial, or service of any punishment, nor scheduled solely for the purpose of UCMJ action. This would constitute involuntary activation and would be authorized only in accordance with the procedures set out above.

#### **B-8. Nonjudicial Punishment (Article 15)**

*a.* Reserve Component soldiers may receive nonjudicial punishment pursuant to Article 15, UCMJ, while serving in a Title 10 status on AD, ADT, AT, or IDT. Reserve Component soldiers may be punished pursuant to Article 15 while serving on IDT provided that the proceedings are conducted and any punishment administered is served during normal IDT periods. Prior to taking such actions, RC commanders should consult with their supporting RC and AC staff or command judge advocate.

*b.* Either RC or AC commanders may impose Article 15 punishment on reserve enlisted soldiers of their commands.

*c.* Unless further restricted by higher authority, punishment for RC officers is reserved to the AC or RC GCMCA to whose command the RC officer is assigned or attached for disciplinary purposes or by commanding generals in the RC officer's chain of command.

**B-9. Summary Court-Martial**

*a.* Reserve Component soldiers may be tried by SCM while serving in a Title 10 status on AD, ADT, AT, or IDT. Reserve Component soldiers may be tried by SCM while serving on IDT provided that the trial is conducted and punishment is served during normal IDT periods.

*b.* Either RC or AC Summary Court-Martial Convening Authorities (SCMCA) may refer charges against RC soldiers to trial by SCM. An RC SCMCA may refer charges to SCM while on IDT; however, Article 25, UCMJ requires that the summary court officer must be on AD at the time of trial.

**B-10. Special and General Courts-Martial**

*a.* Reserve Component soldiers may be tried by special or general court-martial only while serving on AD. Remember the rules for ordering RC soldiers to AD discussed in B-5 above.

*b.* Only an AC GCMCA may refer charges against an RC soldier to a special or general court-martial. Courts-martial will normally be conducted at an AC US Army installation. An RC soldier will normally be attached to an AC installation for trial.

**B-11. Forfeitures**

Forfeitures imposed upon RC soldiers pursuant to Article 15 or court-martial action will be calculated in whole dollar amounts based on the base pay for an AC soldier of the same grade and time in service rather than on the basis of how much drill pay the RC soldier may have earned during the period of forfeiture.

**NOTE**

Definitive information pertaining to the military justice system is found in AR 27-10, Military Justice.